



## **46 CFR Parts 501 and 502**

**[Docket No. FMC-2023-0011]**

**RIN: 3072-AC97**

### **Delegations to Bureau of Enforcement, Investigations, and Compliance**

**AGENCY:** Federal Maritime Commission

**ACTION:** Final rule.

**SUMMARY:** The Federal Maritime Commission (Commission) is delegating authority to the Bureau of Enforcement, Investigations, and Compliance (BEIC), to issue Notice(s) of Violations and to compromise civil penalty claims subject to review by the Commission. Delegation of authority to BEIC provides enhanced efficiency flexibility during the enforcement process while maintaining Commission oversight.

**DATES:** The rule is effective without further action on [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** William Cody, Secretary; Phone: (202) 523-5725; Email: [secretary@fmc.gov](mailto:secretary@fmc.gov).

### **SUPPLEMENTARY INFORMATION:**

#### **I. INTRODUCTION**

The Commission's Bureau of Enforcement, Investigations, and Compliance (BEIC) is responsible for investigating potential violations of the Shipping Act of 1984, as amended, and associated Commission regulations, and initiating enforcement actions. The Commission is delegating authority to BEIC to issue Notice(s) of Violations (NOV) and to compromise civil penalty claims subject to approval by the Commission. Delegation of authority to BEIC coupled with Commission review of compromise agreements will provide enhanced efficiency and flexibility during the enforcement process while maintaining Commission oversight.

#### **II. BACKGROUND**

Pursuant to its authority under the Shipping Act of 1984, as amended, Commission regulations currently provide for two types of enforcement actions seeking civil penalties, formal enforcement action under 46 CFR 502.63 and informal compromise procedures under 46 CFR 502.604. Currently, both require Commission approval to proceed at multiple steps during the process, thereby making the enforcement process unnecessarily burdensome and hindering the efficient resolution of enforcement matters.

The current process for BEIC to conduct an enforcement action requires: (1) providing notice to the subjects of investigations that BEIC intends to recommend that the Commission initiate enforcement proceedings and allowing the subject an opportunity to respond before BEIC submits those recommendations and responses to the Commission for approval; (2) receiving Commission approval before formal or informal enforcement action is undertaken, including approval to enter into compromise discussions; and (3) receiving Commission approval of any proposed compromise agreements. The current process has proven procedurally complicated since it involves multiple levels and cycles of approval prior to any case culminating in resolution. The rigidity of the process combined with the opportunity for respondents to submit responses of up to 40 pages has increased time and resource costs in enforcement matters both for the Commission and for the entities it regulates.

### **III. REGULATORY CHANGES**

As briefly described in Section II, the Commission is streamlining the current process by delegating authority to BEIC to issue Notice(s) of Violations setting forth alleged violations and to compromise such claims, subject to review by the Commission instead of requiring Commission approval at each step under the current approach. Compromise agreements will be subject to Commission review after the parties have reached an agreement rather than before negotiations begin and again at the conclusion, thereby increasing the efficiency of Commission enforcement efforts by removing an added level of approval at the outset of an informal enforcement action.

The revised procedure will also give BEIC delegated authority with respect to the investigative and initial compromise phases of the enforcement process. Specifically, BEIC will have the authority to (1) directly enter discussions to compromise civil penalty allegations prior to the issuance of an NOV if a party requests to negotiate a compromise, (2) issue NOVs providing notice of alleged violations and the corresponding civil penalty proposed by BEIC, or (3) recommend that the Commission institute a formal adjudicatory proceeding. An NOV will provide the opportunity for the subject to either request to enter into compromise discussions or to submit a written response, if desired. The Commission retains the authority to review any proposed compromise agreement reached by the parties pursuant to § 501.11(f)(2); and Commission approval continues to be required to initiate a formal proceeding pursuant to § 502.63(a). Accordingly, BEIC has the flexibility to assess an enforcement matter and to determine the most appropriate process given the facts of a particular matter.

#### *A. Informal Enforcement Process*

The Commission is revising the informal enforcement process under § 502.63(d) to give BEIC discretion to issue an NOV to expedite the enforcement process. The current pre-enforcement notice (PEN) process requires multiple levels of review and approval for an enforcement case to progress, starting with the issuance of a PEN and culminating either in a compromise agreement or a formal proceeding. In either instance, BEIC's ability to compromise is subject to approval by the Commission. Once a PEN is issued, the respondent has 30 days to submit a written response, limited in length to 40 pages, addressing the alleged violations identified in the PEN. If a respondent desires to initiate compromise discussions regarding BEIC's preliminary determinations instead of proceeding with a written submission, BEIC is currently required to obtain Commission approval prior to entering such discussions. These regulatory changes are intended to provide a basic framework for the new process. Under the revised process, the respondent may either request to enter compromise discussions (and BEIC would proceed, if appropriate, with these discussions immediately without first seeking

Commission approval) or submit a written response.

#### *B. Delegation of Authority to BEIC*

The Commission is revising § 501.18 to add a new section giving BEIC the authority to issue NOVs and informally identify and compromise civil penalties, subject to review by the Commission. The grant of delegated authority gives BEIC the flexibility to resolve cases where a respondent requests to compromise the civil penalty ahead of the issuance of a NOV as well as authority to enter into compromise discussions after issuance of a NOV. The discretion to exercise either option allows BEIC to conclude cases on an expedited timeline where a respondent is preemptively offering to not only negotiate in good faith but also to provide disclosures that may lead to the opening of other investigations of violations of the Shipping Act by other entities involved in violations voluntarily disclosed by the respondent. Commission oversight is maintained by providing the Commission with the opportunity to review all compromise agreements prior to them becoming effective.

### **IV. RULEMAKING ANALYSIS AND NOTICES**

#### *A. Review Under the Administrative Procedure Act*

The Administrative Procedure Act (APA) requires that a notice of proposed rulemaking be published in the Federal Register unless certain exceptions apply. 5 U.S.C. 553(b). These exceptions include rules of agency procedure or practice, 5 U.S.C. 553(b)(A), as well as rules for which the agency finds good cause to waive notice and comment as unnecessary, impracticable or contrary to the public interest. 5 U.S.C. 553(b)(B). This rule amends regulations that set forth the agency's internal procedures by delegating to the BEIC the authority to engage in the investigative and initial compromise phases of the enforcement process while retaining the Commission's authority to review any proposed compromise agreement reached by the parties pursuant to § 501.11(f)(2) and in approving the initiation of a formal proceeding pursuant to § 502.63(a). Accordingly, the exception to the notice and comment provisions provided under 5 U.S.C. 553(b)(A) applies. Similarly, because this rule involves changes to the Commission's

internal procedures on its administratively handling of enforcement-related matters, holding notice and comment on these changes would be impracticable, unnecessary, and contrary to the public interest since it would delay Commission's implementation of these changes and may impact the efficiently handling of these matters. For these reasons, the Commission also finds that notice and comment on the adoption of these internal procedural changes is unnecessary, impracticable and contrary to the public interest under 5 U.S.C. 553(b)(B).

#### *B. Congressional Review Act*

This final rule is not a "rule" as defined by the Congressional Review Act (CRA), codified at 5 U.S.C. 801 *et seq.*, and is not subject to the provisions of the CRA. The CRA adopts the Administrative Procedure Act's definition of a "rule" in 5 U.S.C. 551, subject to certain exclusions. *See* 5 U.S.C. 804(3). In particular, the CRA does not apply to rules relating to agency management and personnel and rules of agency organization, procedure, and practice that do not substantially affect the rights or obligations of non-agency parties. *Id.* This final rule relates to agency management and personnel as well as agency organization, procedures, and practices. Specifically, this final rule revises internal Commission delegations of investigatory and initial settlement authority to BEIC and the regulations governing enforcement procedures. The only effect the changes have with respect to non-agency parties is to provide parties with an earlier opportunity to enter compromise discussions with BEIC. The Commission already provides notice and an opportunity to respond in both formal and informal enforcement procedures. For informal compromise actions, the rule delegates to BEIC the authority to issue a NOV and to enter into compromise discussions. Accordingly, although the Interim Final Rule may affect the timing and manner of non-agency parties' interactions with the Commission, it does not affect their underlying rights and obligations under the Shipping Act and the Commission's regulations. Therefore, this final rule is not a "rule" under the CRA and is not subject to the CRA's requirements.

#### *C. Regulatory Flexibility Act*

The Regulatory Flexibility Act (codified as amended at 5 U.S.C. 601–612) provides that whenever an agency promulgates a final rule after being required to publish a notice of proposed rulemaking under the APA (5 U.S.C. 553), the agency must prepare and make available a final regulatory flexibility analysis (FRFA) describing the impact of the rule on small entities. 5 U.S.C. 604. An agency is not required to publish an FRFA, however, for the following types of rules, which are excluded from the APA’s notice-and-comment requirement: interpretative rules; general statements of policy; rules of agency organization, procedure, or practice; and rules for which the agency for good cause finds that notice and comment is impracticable, unnecessary, or contrary to public interest. *See* 5 U.S.C. 553(b).

As discussed above, this final rule is a rule of agency organization, procedure, or practice. Therefore, the APA does not require publication of a notice of proposed rulemaking in this instance, and the Commission is not required to prepare an FRFA.

#### *D. National Environmental Policy Act*

The Commission’s regulations categorically exclude certain rulemakings from any requirement to prepare an environmental assessment or an environmental impact statement because they do not increase or decrease air, water or noise pollution or the use of fossil fuels, recyclables, or energy. 46 CFR 504.4. This rule revises internal Commission delegations of investigatory and initial settlement authority to BEIC and the regulations governing enforcement procedures with respect to potential Shipping Act violations. This rulemaking thus falls within the categorical exclusions for procedural rules pursuant to 46 CFR part 502 (§ 504.4(a)(4)), investigatory and adjudicatory proceedings, the purpose of which is to ascertain past violations of the Shipping Act of 1984 (§ 504.4(a)(22)), and matters related to Commission personnel (§ 504.4(a)(28)).

Therefore, no environmental assessment or environmental impact statement is required.

#### *E. Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521) (PRA) requires an

agency to seek and receive approval from the Office of Management and Budget (OMB) before collecting information from the public. 44 U.S.C. 3507. The agency must submit collections of information in rules to OMB in conjunction with the publication of the notice of proposed rulemaking. 5 CFR 1320.11. This final rule does not contain any collections of information as defined by 44 U.S.C. 3502(3) and 5 CFR 1320.3(c).

*F. Executive Order 12988 (Civil Justice Reform)*

This rule meets the applicable standards in E.O. 12988 titled, “Civil Justice Reform,” to minimize litigation, eliminate ambiguity, and reduce burden.

*G. Regulation Identifier Number*

The Commission assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulatory and Deregulatory Actions (Unified Agenda). The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda, available at <http://www.reginfo.gov/public/do/eAgendaMain>.

## **List of Subjects**

### **46 CFR Part 501**

Administrative practice and procedure, Authority delegations (Government agencies), Organization and functions (Government agencies).

### **46 CFR Part 502**

Administrative practice and procedure, Claims, Equal access to justice, Investigations, Lawyers, Maritime carriers, Penalties, Reporting and recordkeeping requirements.

For the reasons set forth above, the Federal Maritime Commission amends 46 CFR parts 501 and 502 of chapter IV of Title 46, Code of Federal Regulations as set forth below:

## **PART 501—THE FEDERAL MARITIME COMMISSION—GENERAL**

1. Revise the authority citation for part 501 to read as follows:

**Authority:** 5 U.S.C. 551-557, 701-706, 2903 and 6304; 31 U.S.C. 3721; 41 U.S.C. 414 and 418; 44 U.S.C. 501-520 and 3501-3520; 46 U.S.C. 40101-41309, 42101-42109, 44101-44106, 46101-46108; Pub. L. 89-56, 70 Stat. 195; 5 CFR Part 2638; Pub. L. 104-320, 110 Stat. 3870.

2. Add § 501.18 to subpart B to read as follows:

**§ 501.18 Delegation to the Director, Bureau of Enforcement, Investigations, and Compliance.**

As set forth in §§ 502.63(d) and 502.604, the Director, Bureau of Enforcement, Investigations, and Compliance (BEIC) has delegated authority to issue Notice(s) of Violations (NOV) and to compromise civil penalty claims subject to review by the Commission pursuant to § 501.11(f)(2). This delegation shall include the authority to compromise claims relating to the retention, suspension, or revocation of ocean transportation intermediary licenses.

**PART 502—RULES OF PRACTICE AND PROCEDURE**

3. Revise the authority citation for part 502 to read as follows:

Authority: 5 U.S.C. 504, 551, 552, 553, 556(c), 559, 561-569, 571-596; 5 U.S.C. 571-584; 18 U.S.C. 207; 28 U.S.C. 2112(a); 31 U.S.C. 9701; 46 U.S.C. 40103-40104, 40304, 40306, 40501-40503, 40701-40706, 41101-41109, 41301-41309, 44101-44106, 46105; 5 CFR part 2635.

4. In § 502.63, revise paragraphs (a), paragraph (d) paragraph heading and (d)(1) to read as follows:

**§ 502.63 Commission enforcement action.**

(a) The Commission may issue an Order of Investigation and Hearing commencing an adjudicatory investigation against one or more respondents alleging one or more violations of the statutes that it administers. Prior to recommending the issuance of an Order of Investigation and Hearing, BEIC will provide a respondent with notice of BEIC's intent and provide the respondent with the opportunity to make a written submission within 15 days for consideration

by the Commission.

\* \* \* \* \*

(d) *Informal enforcement process.* (1) BEIC may issue a Notice of Violations (NOV) to provide the person or persons with notice of the alleged violations and provide the opportunity for informal resolution of such claims pursuant to the procedures in § 502.604. [Rule 63.]

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5. Revise § 502.604 to read as follows:

**§ 502.604 Compromise of penalties: Relation to assessment proceedings.**

(a) *Scope.* Except in pending civil penalty assessment proceedings provided for in § 502.603, the Commission, when it has reason to believe a violation has occurred, may invoke the informal compromise procedures of this section.

(b) *Notice.* When the Commission considers it appropriate to afford an opportunity for the compromise of a civil penalty, it will, except when circumstances render it unnecessary, send a Notice of Violations (NOV) to the respondent by electronic and registered or certified mail, or by other means reasonably calculated to give notice. The NOV will describe specific violation(s) on which the claim is based, including the particular facts, dates, and other elements necessary for the respondent to identify the specific conduct constituting the alleged violation; the amount of the penalty demanded; and the names of Commission personnel with whom the demand may be discussed, if the person desires to compromise the penalty. The NOV also will state the deadlines for the institution and completion of compromise negotiations. If a compromise agreement is not reached between the parties and BEIC intends to recommend that the Commission institute a formal proceeding pursuant to § 502.63(a), then BEIC shall provide notice of its intent to the respondent and provide the respondent with the opportunity to make a written submission within 15 days for consideration by the Commission.

(c) *Request for compromise.* Any person receiving an NOV provided for in paragraph (b) of this section may, within the time specified, request opportunity for informal resolution, deny the

violation, or submit materials explaining, mitigating, or showing extenuating circumstances, as well as make voluntary disclosures of information and documents.

(d) *Criteria for compromise.* In addition to the factors set forth in § 502.603(b), in compromising a penalty claim, the Commission may consider litigative concerns, the cost of collecting the claim, and enforcement policy.

(e) *Disposition of claims in compromise procedures.* (1) When a penalty is compromised and the respondent agrees to settle, a compromise agreement shall be executed by the respondent. This agreement, after reciting the nature of the claim, will include a statement evidencing the respondent's agreement to the compromise of the Commission's penalty claim for the amount set forth in the agreement and will also embody an approval and acceptance provision which is to be signed by the appropriate Commission official subsequent to Commission review under § 501.11, if any. Upon compromise of the penalty in the agreed amount, a duplicate original of the fully executed agreement shall be furnished to the respondent.

(2) Upon completion of the compromise, the Commission may issue a public notice thereof, the terms and language of which are not subject to negotiation.

(f) *Relation to assessment proceedings.* Except by order of the Commission, no compromise procedure shall be initiated or continued after institution of a Commission assessment proceeding directed to the same violations. Any offer of compromise submitted by the respondent pursuant to this section shall be deemed to have been furnished by the respondent without prejudice and shall not be used against the respondent in any proceeding.

(g) *Delegation of compromise authority.* The compromise authority set forth in this subpart is delegated to the Director, Bureau of Enforcement, Investigations, and Compliance. The Director, Bureau of Enforcement, Investigations, and Compliance, has the authority to negotiate the terms of compromise agreements, provided that any compromise agreement shall not become effective until the Commission has had the opportunity to review pursuant to § 501.11(f)(2). [Rule 604.]

By the Commission.

William Cody,  
Secretary  
Billing Code: 6730-02

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